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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1977

L. S. BROADUS,

Petitioner

vs.

LEAH LUNDY LOTT,

Administratrix of Estate of

ARCHIE A. LOTT, *Deceased*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALBERT SIDNEY JOHNSTON, JR.
1111 West Howard Avenue
Biloxi, Mississippi 39533
Counsel for Petitioner

April 17, 1978

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2 - 4
CONSTITUTIONAL PROVISIONS INVOLVED	4 - 5
STATEMENT OF FACTS	5 - 7
REASONS FOR GRANTING THE WRIT	7 - 19
CONCLUSION	20
CERTIFICATE OF SERVICE	20
APPENDIX A (Opinion of Supreme Court of Mississippi)	1a - 7a
APPENDIX B (Judgment of Supreme Court of Mississippi)	9a
APPENDIX C (Judgment of Supreme Court of Mississippi denying rehearing in banc)	10a
APPENDIX C (Constitution of United States, Amendment XIV)	12a
APPENDIX D (Constitution of Mississippi of 1890, Section 14 and 16)	13a
APPENDIX E (Mississippi Statutes, Code 1942 and 1972)	13a - 17a

CASE CITATIONS

Byrd vs. King, 120 MS 435

Campbell vs. Northwestern Eckington Improvement Company, 229 US 561

Clay vs. Field, 138 US 464 ..... 12, 13

Clay vs. Freeman, 118 US 97 13

Clifton vs. Clark, 83 Miss. 446 18

Consaul vs. Cummings, 222 US 262 18

Emerson vs. Senter, 118 MS 3 ..... 13, 18

Hanway vs. Robertshaw, 49 MS 758 12

Karrick vs. Hannaman, 168 US 328 ..... 7, 11, 17

Long vs. Thayer, 150 US 521 ..... 7, 11, 18

Mayson adms vs. Beazley, 27 MS 106 ..... 8, 14, 17
McCaughn vs. Brown, 76 Miss 496 13
McClennen vs. Commissioner, 25 So. 155, 131 Fed. 165 ..... 10, 11, 12, 18
Pryer vs. Gozer, 172 MS 461, 59 So. 99 15
Robertshaw vs. Hanway, 52 MS 713 12
Riddle vs. Whitehill, 135 US 621 ..... 13, 18
Scott vs. Searles, 5 Smede & M. (13 MS) 25 11
Superior Oil Co. vs. Foote, 214 M. 890, 59 So 2d 851, 27 ALR2d 415, Sugn Error Overr 214 M. 890, 59 So2d 844 15
Southerland vs. Mayer, 271 US 272 18
Swan vs. Buck, 140 MS 268 15
Tucker Printing Co. vs. Attala County, 171 MS 608, 158 So. 336 15
Whitcliff vs. Eve, 17 HOW (US) 468 18
Wisconsin Lbr. Co. vs. State, 97 M. 571, 54 So. 247 15
Zimmerman vs. Harding, 227 US 489 18

UNITED STATES AND STATE CONSTITUTIONAL PROVISIONS

United States Constitution, Art. 1, Sec. 10 ..... 12a
United States Constitution, Amendment XIV 12a
Mississippi Constitution 1890, Sec. 14 ..... 13a
Mississippi Constitution, Sec. 16 ..... 13a

MISSISSIPPI STATUTES

Section 553 to 560, Code 1942 7
Title 91-7-119 thru 91-7-133 ..... 7, 8
Mississippi Code 1972, Title 91-7-173 ..... 7, 8

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The petitioner, L. S. Broadus, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Mississippi, rendered in these proceedings on November 16, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, marked "This opinion is not for publication", appears at Appendix A, infra, pp. 1a - 7a.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on November 16, 1977. See Appendix B, p. 9a, infra.

Petition for rehearing was timely filed and denied en banc, without opinion, on January 18, 1978. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 18 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Leah Lundy Lott, widow of Archie A. Lott, brought suit on December 11, 1969, to continue the partnership between her deceased husband, Archie A. Lott, and petitioner, which was terminated by the death of said Archie A. Lott on December 3, 1969, and for accounting and injunctive relier. The Trial Court signed the decree permitting said Executrix to continue partnership with petitioner for a period of three years without any process on petitioner. The deceased contributed no capital to said partnership, his only contribution being his services in the operation and management of said partnership business, for which he was paid 50% of the profits of the business. In this abbreviated posture of the record, etc. due to petitioner's refusal to recognize deceased's widow as his former partner's successor and account to her for post-dissolution profits after December 3, 1969, up to and including September 30, 1973, because of which he moved the court to vacate the decree continuing the partnership and filed demurrers challenging the legal sufficiency of her petition for authority to continue said partnership with petitioner. The state court rendered judgment in

favor of the Executrix for postdissolution profits from December 3, 1969, to and including September 30, 1973, with 5% damages and interest from date of affirmation of the decree. The questions thereby arising on the face of the record are:

1. Whether the widow of a deceased partner may, over protest of surviving partner, have authority by decree of court to continue the partnership business of deceased partner with the surviving partner.

2. Whether such widow of deceased partner is entitled to judgment for one-half of post-dissolution profits of the business continued by surviving partner in his individual capacity extending from partners death on December 3, 1969 to and including September 30, 1973.

3. Whether, and to what extent, the widow of deceased partner may share in such post-dissolution profits earned in period from and after death of deceased partner, to-wit, December 3, 1969 to and including September 30, 1973.

4. Whether the judgment of the Supreme Court of Mississippi affirming the decree of the lower court, awarding judgment in favor of the widow of deceased partner of petitioner impaired the obligation of petitioner's contract with his deceased partner.

5. Whether the action of the Supreme Court of Mississippi in rendering said judgment against petitioner violates the United States Constitution, Amendment 14, and deprives petitioner of his property without due process of law and impairs the obligation of petitioner's contract with his deceased former partner.

6. Whether the widow of a deceased partner whose only contribution to the co-partnership was his personal services and skill is entitled to share in profits earned after dissolution of the partnership, in the absence of contract so providing.

7. Whether the estate of a deceased partner is entitled to share in profits earned by the continuation of the business of former partnership by surviving partner, over and beyond the use to which such deceased partner's interest in the capital of the firm is put, and if such estate claiming an interest in the profits earned after the dissolution of the partnership had no interest in the capital of the firm after dissolution, would said estate be entitled to share in the profits earned to the extent of 50% net from the date of his death, on December 3, 1969, to and including September 30, 1973.

8. Whether a partner whose only contribution to the firm is his personal services and skill is entitled to a share of the profits earned after dissolution of the partnership by his death.

9. Whether the decree of the lower court, affirmed by the Supreme Court of Mississippi takes the property of petitioner without due process of law, and in fact violates petitioner's contract with deceased, in violation of the contract clause of the Constitution of the United States and the Mississippi Constitution by impairing the obligation(s) of petitioner's contract with deceased.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of United States, Art 1, sec 10, cl 1, impairment of obligation of contracts.

2. Constitution of the United States Amendment XIV, sec. 1, due process and equal protection of the laws.

3. Mississippi Constitution secs. 14 and 16.

STATEMENT OF FACTS

The facts revelant to the questions presented by this petition are uncontroverted and therefore are presented to the court in a summary manner.

The petitioner, L. S. Broadus, during the period of time from early 1962 to December 3, 1969, was in co-partnership business with deceased, Archie A. Lott, whose only contribution to the business was his time and services. He contributed nothing to the capital of the business. He received fifty percent of the net profit as salary. Whether he received all of his share of said profits during the year 1969 was not determined by the Master in Chancery, the Trial Court or the Supreme Court of Mississippi. It is conceded that deceased was entitled to his fifty percent share of the net profits to the time of his death, on December 3, 1969. The accounting firm engaged by the Master in Chancery, appointed by the Trial Court, advised counsel and the Court he could not find anywhere in the record that deceased partner, Archie A. Lott, contributed anything to the capital of his co-partnership with petitioner. Prior to time petitioner, as the surviving partner of the partnership Broadus-Lott was advised that said co-partnership terminated and ended on December 3, 1969 upon the death of Archie A. Lott, he offered to compromise and settle the matter with deceased's widow for a sum in the neighborhood of $25,000, but when his offer was refused it was withdrawn by him.

The CPA called as a witness by the Master testified the deceased, Archie A. Lott, had no net worth in the partnership business. He said his accounting firm considered the partnership of Broadus-Lott terminated and ended on December 3, 1969, and after that the business was continued as a sole proprietorship with petitioner as the proprietor.

The balance sheet figures submitted by the accountants and introduced in evidence show that there was little or no closing inventory at the end of 1969 and very little assets in the form of furniture and fixtures and the accounts receivable were later found by said accountants and the Master to be uncollectable and mostly barred by the statutes of limitation.

Petitioner responded to the claim of the administratrix of his deceased partner to continue the business of the partnership (record, pg 1-4, Ab 1-9) and alleged said partnership was dissolved by operation of law upon the death of Lott, and there was no authority for the lower court to continue said business. Petitioner filed motion to strike the order allowing the administratrix of his deceased partner to continue the business, and demurred to her petitions (Ab. 5-6).

In opposition to the contention of petitioner, the lower court held the trial court was authorized to continue the operation of said partnership business for a period of three years, and overruled the motion to vacate and the three demurrers. The claim of petitioner that deceased had no capital investment in the partnership business was not denied in the pleadings or in the testimony.

Petitioner's claim that the obligation of his contract

with deceased was impaired, contrary to the Constitution of the United States and the Constitution of Mississippi, has not been disposed of in the opinion of the state court and the decision of the Mississippi Supreme Court could not have been reached without considering and deciding the constitutional questions involved below and now before the Supreme Court of the United States, including the claim petitioner was denied due process and the equal protection of the law.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Mississippi directly conflicts with the decisions of this court and more particularly **Kairick v Hannaman** 168 US 328, 42 L Ed 488, 18 S Ct 135; **Long v Thayer**, 150 US 521, 38 L Ed 1167, 14 S Ct 189, and cases too numerous to mention, holding the death of a partner dissolves by operation of law the partnership of which the deceased was a member.

The Mississippi statutes, Code 1942, sec. 553 to 560, inc. now Code 1972, Title 91-7-119 thru 91-7-133, do not permit the continuation of such partnership and Miss. Code 1972, Title 91-7-173 only authorizes the continuation of a business in sole proprietorship. The action of the trial court in authorizing the continuation of the partnership business after December 3, 1969 was illegal and unlawful and petitioner's demurrers to the petition of the administratrix to continue the partnership business should have been sustained. The Mississippi statutes, Code 1942, Sections 553-560, and Code of 1972, 91-7-119 thru 91-7-133, provide the only remedy in the case of dissolution of partnerships by the death of one of the partners.

The decisions of the state supreme court has the effect

of impairing the obligation of petitioner's contract with the deceased, Archie A. Lott. This question was not only ripe for decision by the state court, but the decision of said court could not have been reached without deciding the constitutional questions involved in this case; and too, the decision of the state court would also deprive the petitioner of due process of law and the equal protection of the law.

The **Mason v Beasley case** cited in the opinion by the state Supreme Court reported in 27 Miss 106, was decided in 1854, since which time Mississippi Code of 1942, secs 553 to 560 and Code of 1972, Title 91-7-119 thru 91-7-133 provide the complete legal remedy for partners and deceased partners and again pose the question whether petitioner's demurrers should have been sustained and the administratrix of deceased relegated to such statutory remedy.

This case abundantly demonstrates the folly of attempting to escape if not evade statutory procedure, and the burden imposed on both the litigants and the courts. Petitioner was never cited by the administratrix to make the statutory bond to administer whatever interest the deceased had in said partnership, and the trial court was not required to cite petitioner as the surviving partner, to account as in the case of an administrator.

For whatever reason, it is obvious that the administratrix of the deceased, Archie A. Lott, did not avail of her right upon giving bond as provided in Title 91-7-131 and forthwith take the whole of whatever partnership estate was extant, into her own possession and be authorized to use the name of the survivor in collecting debts due to the late firm, and with the partnership's property, if any, pay the debts and return or pay

petitioner as the surviving partner his share of the excess, if any there be.

2. By permitting the continuation of the partnership business from and after the death of Archie A. Lott on December 3, 1969, up to and including September 30, 1973, the state court (s) not only denied petitioner due process of law, but the equal protection of the law, and would require him to continue in partnership business with person not of his choice and with whom he had no contractual relationship.

Since the date of the decision by the state court, Mississippi has enacted the Uniform Partnership Act, which makes provision for all such cases. That fact is mentioned in the opinion of the state court. The reasons assigned in the second to last paragraph on page 6 of the state court conclusively point up the several causes of error implicit in the state court opinion. There is manifest error in the statement that "the continuing nature of the partnership business" had anything to do with the disagreement, if any there was, between petitioner and the administratrix. Mrs. Lott was never involved in any joint engagement with petitioner in the operation of the partnership business after the death of her husband, and the undisputed facts in the record are that Archie A. Lott died on December 3, 1969 and the deceased's widow filed her petition to continue the business of the partnership within a short time after that date, in fact on December 11, 1969. But process was not requested and petitioner was not summoned to answer; in fact, he did not answer until he was summoned at a much later date to answer a citation for contempt, and since the filing of her suit, petitioner has been almost constantly in court, confronted with the grotesque if not ridiculous claims made by said party on behalf of the estate.

The answer to the statement in the opinion of the state court that "we have found no later cases from this state, nor are we cited any, to alter this common law principle. Nor does sec. 91-7-119 (providing for sale of partnership interest) alter the principle where a business is continued and there is no request for the order of sale," is the pole-star to the proper decision in this case. As previously stated, the Mississippi Code provisions cited in this petition and set forth in full in the appendix afford a full and complete remedy in this type case. If the trial court and the state supreme court had applied said statutes to the facts of this case the matters would long ago have been concluded to the entire satisfaction of all parties, and with a minimum of cost.

In Sec. 298 p 195-196 60 Am Jur 2d Partnerships, the rule is stated to be partner's interest in profits earned subsequent to the dissolution of the partnership is such share of the profits as his interest in the capital of the firm bears to the total capital, or, in other words, such share of the profits as can rightly be attributed to the continued use of his property or capital in the business, citing **McClennen v Commissioner** (Ca1) 131 F 2d 165, 144 ALR 1121. See ALR ANNO-80 ALR 12,68: 55 ALR 2d 1391, 1417, sec. 39.

"The right of a partner to share in the profits earned by the continuation of a partnership business after dissolution of a firm is founded upon the use to which such partner's interest in the capital of the firm has been put in earning their subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned", citing ANNO:80 ALR 12,68; 55 ALR 2d 1391, 1417, sec. 39, and Urzi v Urzi 140 Cal app 2d

589, 295 P 2d 539; **Essay v Essay**, 175 Neb 730, 123 NW 2d 648.

Under the Uniform Partnership Act, UPA sec. 42 it has been held that the former partner of their dissolved partnership does not share in the post-dissolution profits in the same ratio as prior to dissolution, but rather, his share of post-dissolution profits is the amount earned by his interest in the dissolved partnership.

As overwhelmingly appears by the record evidence, the deceased, Archie A. Lott, contributed nothing to the capital of the partnership business; his only contribution was his skill and services. Under the law in such cases where a deceased partner receives a share of the profits for his work and labor without contributing to the capital, his death terminates his right in the partnership, and since the record does not show the partnership owed the deceased any salary at the time of his death on December 3, 1969, judgment against petitioner Broadus is without support in the record.

The partnership between the deceased, Archie A. Lott, and petitioner was dissolved by the death of Lott, on December 3, 1969. **Karrick vs. Hannaman**, 168 US 328; **Long vs. Thayer**, 150 US 520; and **McClennen vs. Commissioner** (CA1) 131 F2d 165. The state courts were without power and authority to continue the partnership for a period of thirty-six (36) months, and authorize the administratrix to continue the business with petitioner. Upon the death of Archie A. Lott, his right in specific partnership property vested in his surviving partner, the petitioner, and it became the duty of petitioner to wind up the partnership affairs without delay and in the best manner possible for the benefit of the deceased's estate, including the right and duty to pay any and all partnership indebtedness. **Scott vs. Searles**, 5 Smedes & M. (13 Miss.)

25; **Hanway vs. Robertshaw,** 49 Miss. 758; **Robertshaw vs. Hanway,** 52 Miss. 713. In fact, the surviving partner, the petitioner, succeeded to the rights of his deceased partner in all of the partnership assets. The duties imposed on the petitioner, as the surviving partner, included the collection of debts and obligations due the firm, **McClennen vs. Commissioner,** supra, the payment of firm debts and the performance of firm obligations, the sale of partnership property, the distribution of the resulting assets among the partners, and the carrying on of the firm business for the purpose of winding it up. **Clay vs. Field,** 138 US 464; **McClennen vs. Commissioner,** supra. The statutory law of Mississippi, applicable in this type case, is set forth as an appendix to this petition, being Sections 553 to Section 560 of the Code of 1942, and Title 91-7-119 through 91-7-133 of the Code of 1972. These statutes were called to the attention of the trial court and the Supreme Court of Mississippi, and petitioner moved the court to set aside and cancel the order of the trial court authorizing the administratrix of the deceased partner, to continue the partnership business with petitioner, because said order was contrary to the law and petitioner demurred to the petitions, supplemental, and amended of the administratrix, for the reason said administratrix was not entitled to the relief prayed for, or any relief, at that time, but on the contrary, she was interferring with the performance of the duties imposed by law on the petitioner, that is to wind up his partnership business with the deceased for the best interests of all parties concerned. In the circumstances of the case, overwhelmingly appearing of record, and not even attempted to be denied, the only right possessed by Leah Lundy Lott, administratrix of petitioner's deceased partner, Archie A. Lott, was to enforce her right to receive in cash, a sum of money to be due her upon a liquidation of the partnerships affairs, and an accounting by the

petitioner as the surviving partner. **McCaughn vs. Brown,** 25 So. 155, 76 Miss. 496.

For the purpose of winding up the partnerships affairs, the legal title to the firm's assets vested in petitioner as the surviving partner, and petitioner was given the exclusive right to the possession and control of the partners' assets, **Riddle vs. Whitehill,** 135 US 621, with power to sell said property **(Emerson vs. Senter,** 118 US 3) for the purpose of paying the partnership's debts and disposing of the effects of the partnership for the benefit of himself and the estate of the deceased. **Riddle vs. Whitehill,** supra. The surviving partner in possession of the partnership property had the right to hold it until the debts of the firm were paid including any indebtedness owed to petitioner. **Clay vs. Freeman,** 118 US 97. The action of the administratrix of the deceased partner's estate, was, hence contrary to law, and prevented petitioner from doing his statutory duty as a surviving partner to wind up the partnership affairs, and to render an account of the performance of his trust to the personal representative of the deceased partner, and to pay over to her the share, if any, of such deceased partner in the surplus of the firm property. **Clay vs. Field,** supra, 138 US 464. Since the rights of the heirs of the deceased partner attach only to the surplus that remains after the partnerships debts are all paid and the affairs of the firm wound up, a surviving partner cannot be compelled to continue the partnership with representative of deceased but only do his duty according to the law, unless it appears that he has in his hands partnership property in excess of the amount required to pay partnership debts and to reimburse himself for debts due him by the firm.

Considering the fact that the deceased partner,

Archie A. Lott, died on December 3, 1969, and his administratrix, Leah Lundy Lott, petitioned the court on December 11, 1969, for authority to continue the partnership business for a period of thirty-six (36) months, it was impossible for the state courts to determine the status of the partnership accounts and whether or not there would be a surplus after the settlement of all the partnership liabilities. The State Supreme Court committed manifest prejudicial error in affirming the decree of the chancery court. The deceased partners' administratrix did not afford the surviving partner sufficient time to comply with statutory law governing the handling of deceased partners estates by surviving partners.

Unlike **Mayson's Administrator vs. Beazley's Administrator,** 27 Miss. 106 (1854), cited in the opinion of the state court, appendix A, pp. 1a-7a, Archie A. Lott, deceased, made no contribution to the firm capital; instead he contributed his services and skill to the firm for which he drew a monthly salary, and too, unlike **Mayson's Administrator vs. Beazley's Administrator,** Broadus contributed all the capital of the firm. Lott drew fifty per cent of the profits as salary, while Broadus drew very little, other than some furniture on one occasion. In the circumstances, Lott had no capital account with the firm after his death, on December 3, 1969, and deceased Lott was no longer entitled to draw the salary, and he had no interest in and right to postdissolution profits. Lott's administratrix was not entitled to continue the partnership's business with Broadus. The state court was powerless to make a contract by and between Broadus and administratrix of the Lott estate. Broadus has the exclusive right to any and all property of the partnership, and the absolute right to wind up the partnership business.

The state court decision and judgment not only

violate the obligations of Broadus's contract with Lott but takes Broadus' property without due process of law and the equal protection of law clause (s) of the Constitution of Mississippi and the Constitution of the United States. Both provisions are copied in the appendix C of this petition.

Petitioner raised the Constitutional questions before the state courts, and more particularly in his petition for rehearing to the Supreme Court of Mississippi, case number 49,662, section five, in the following languages:

> "From the Income and Expense Statements attached to the accounting papers for the years 1969, 1970, and 1971, the Lott Estate would be entitled to a maximum of $19,250.14, which is the sum of one-half of the net profits for those years. Above and beyond this there is no liability of Broadus to the Lott Estate, and the opinion and judgment of the court should be amended and corrected accordingly, with all costs divided and assessed one-half to each, appellant and appellee. To hold otherwise results in impairing the obligation of the contract between Broadus and Lott, in violation of Art. 1, Sec. 10, of the Constitution of the United States, and Art. 3, Sec. 16, of the Constitution of the State of Mississippi, and the following cases:
>
> Tucker Printing Co. vs. Attala County, 171 M. 608, 158 So. 336
> Wisconsin Lbr. Co. vs. State, 97 M. 571, 54 So. 247
> Swan vs. Buck, 140 M. 268
> Pryer vs. Gozer, 172 M. 461, 59 So. 99
> Superior Oil Co. vs. Foote, 214 M. 890, 59

So2d 851, 27 ALR2d 415, Sugn Error Overr 214 M. 890, 59 So2d 844

"We refer the Court also to the authorities in our original and rebuttal briefs and the accounting records, contained in the record.

"Even under the rule of Mayson's Admr. vs. Beazley's Admr., cited by the court, Broadus should only be required to account for whatever profits he may have made by the use of the property of Lott which continued in the partnership after Lott's death. This rule does not differ from and is not contrary to what we urged in our prior briefs. Since Lott's only interest in the business was one-half share of the net profits earned up to the time of his death, and what said amount earned after his death, he was entitled to one-half of $7,644.26, or $3,822.13, plus one-half of the net profits earned on installment sales collected during and after 1969 from sales prior to and during the year 1969, as reflected by the accounting records. These records show that as of 1971 there were no more collections on accounts receivable from 1969 and prior years.

"For the reason stated, and those appearing of record and in appellant's prior briefs, petitioner says the error committed by the trial court and the error complained of in this petitions prejudicial to his rights, and the opinion of this court does not correct such error but instead the judgment of the court affirming the decree of the lower court, confirms and perpetuates the error, and denies petitioner due process of law and impairs the obligation of appellant's con-

tract with the deceased, Archie A. Lott, in violation of petitioner's constitutional rights."

Petitioner advises this court there are special and important reasons why certiorari should be granted and the case briefed and heard on its merits, such, for example (1) the fact that respondent executrix completely ignored and did not avail of Code Sections 553 to Section 560, and Title 91-7-119 through 91-7-133 of the Code of 1972, which provide adequate remedy to the Estate of the deceased partners; (2) the case relied on by said Executrix, and cited by the State Supreme Court as authority for its opinion and judgment against petitioner, is based on different facts and circumstances, including, but not limited to the following: (3) In **Mayson vs. Beazley**, Beazleys' administrator filed his bill to enjoin Maysons' administrator from proceeding to enforce the decree obtained foreclosing the mortgage made by the purchaser of the sawmill property, and Beazley's administrator then enjoined Maysons' administrator and prayed for a settlement of the partnership account. Here, in the Broadus case, Lott's administratrix sued to continue the Broadus-Lott partnership and for partnership accounting, and by so doing prevented Broadus from winding up the partnerships business and settling the partnership affairs. In the Mayson-Beazley case, the court required the surviving partner to account for whatever profits he might have made by the use of the property, it did not authorize the surviving partner to continue the partnership business with the administratrix of the deceased partner. The difference easily provides the distinction. (4) The Mississippi Supreme Court has decided a federal question of substance not previously determined by this court or decided it in a way probably not in accord with applicable decisions of the court, including: **Karrick vs. Hannaman**,

168 US 328; **Long vs. Thayer,** 150 US 520; **Clay vs. Field** 138 US 464; **Consaul vs. Cummings,** 222 US 262; **Emerson vs. Senter,** 118 US 3; **Riddle vs. Whitehill,** 135 US K21, **Whitecliff vs. Eve,** 17 HOW (US) 468, to mention but a few.

No adjustment of capital contributions by petitioner to the partnership of himself and the deceased, Archie A. Lott, was made, and despite the fact the state court's opinion mentions petitioners capital contribution to the partnership, no allowance was made for the services rendered by the surviving partner from and after the death of Archie A. Lott on December 3, 1969. The specific objections were made in the lower courts that although under the law where profits are made by partners subsequent to death, through employment of the firm assets or in continuation of the business of the firm, he is accountable therefore subject to just allowances and deductions to his former partner or to such partner's legal representatives. **Southerland vs. Mayer,** 271 US 272; **Zimmerman vs. Harding,** 227 US 489; and **Clifton vs. Clark,** 83 MS. 446. The trial court and the State Supreme Court did not apply the law of "apportionment of profits" to the facts of the case, but instead have rendered judgment in favor of the administratrix of the deceased for fifty per cent (50%) of said profits from December 3, 1969, to and including September 30, 1973. This is inapposite the rights of a deceased partner. It is the well settled rule that the determination of postdissolution profits is that one claiming an interest in such profits earned subsequently to the dissolution of the partnership is only entitled to such share of the profits as his interest in the capital of the firm bears to the total capital, that is such share of the profits as can rightly be attributed to the continued use of Lott's property or capital in the business. **McClennen vs. Commissioner,** 131 Fed 2nd 165, 144 ALR 1127. This rule is taken from 60 Am Jur 2d, 195-196,

Partnership, Section 298. Continuing, the author of the article says: "The right of a partner to share in the profits earned in the continuation of a partnership business after the dissolution is founded upon the use to which such partner's interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned.

The accountant who was called as a witness by the Master in Chancery and testified said he could not find any where in the record where the deceased partner had contributed any money or property to the capital of the partnership, but rather his only contribution was his services and skill. In this situation, as we argued in the state courts, a partner whose only contribution to the firm is his services or skills is not entitled to share in the profits after dissolution of the partnership where his services ended upon dissolution. This statement of the law is paraphrased from 60 Am Jur Second Partnership, 196, Section 299. Lott had no capital interest in the firm and therefore, the Estate was not entitled to postdissolution profits.

The opinion and judgment of the State Supreme Court, affirming the judgment decree of the Chancelor, deprive petitioner of due process and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and Section fourteen of the Constitution of Mississippi of 1890, and are violate of Art. 1, sec. 10, cl 1, of the Constitution of the United States and Section 16 of the Constitution of Mississippi of 1890, in that such opinion and judgment impair the obligations of petitioner's contract with his deceased partner, the said Archie A. Lott.

CONCLUSION

For the reasons above stated, your petitioner respectfully prays that his petition for a writ of certiorari to the Supreme Court of Mississippi be granted, and that after hearing on the merits of the case such judgment be rendered as to this court may seem meet and proper in the premises.

Respectfully submitted,

Albert Sidney Johnston, Jr.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) printed copies of the foregoing petition for a writ of certiorari to the Supreme Court of Mississippi have this day been mailed postage prepaid, to Mr. Roy B. Strickland, Attorney for Leah Lundy Lott, administratrix of the Estate of Archie A. Lott, deceased, properly addressed to his office at No. 1607 24th Avenue, in the city of Gulfport, Mississippi, 39501.

Dated this 17th day of May, 1978
Albert Sidney Johnston, Jr.
Counsel for Petitioner

April 17, 1978

APPENDIX "A" — PAGES 1a-8a INCLUSIVE, AND CERT. OF CLERK OF MISSISSIPPI SUPREME COURT ATTACHED

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,662

L. S. BROADUS *Defendant/Appellant*

v.

LEAH LUNDY LOTT, ADMINISTRATRIX
OF ESTATE OF
ARCHIE A. LOTT *Complainant/Appellee*

THIS OPINION IS NOT FOR PUBLICATION

COURT FROM WHICH APPEALED:	CHANCERY COURT, HARRISON COUNTY
TRIAL JUDGE:	CHANCELLOR FRANK W. ALEXANDER
ATTORNEYS:	FOR APPELLANT: ALBERT SIDNEY JOHNSTON, JR.
	FOR APPELLEE: ROY B. STRICKLAND
NATURE OF THE CASE:	ACCOUNTING ON DISSOLUTION OF PARTNERSHIP
DISPOSITION:	AFFIRMED

Opinion

BEFORE PATTERSON, ROBERTSON AND SUGG

PATTERSON, CHIEF JUSTICE, FOR THE COURT:

Mrs. Leah Lundy Lott, administratrix CTA of the estate of Archie A. Lott, deceased, brought suit in the Chancery Court of the First Judicial District of Harrison County to require L. S. Broadus, the former partner of her deceased husband, to account for the assets of the partnership business. The court approved the account stated by Larry L. Lenoir, Master in Chancery, and decreed that the estate of Archie A. Lott, deceased, now "revived in the name of Leah Lundy Lott, deceased," have judgment against L. S. Broadus for $27,769.45 as of September 30, 1973, plus interest. The court reserved its ruling concerning the partnership accumulations enuring to the benefit of said estate since that date.

Broadus objected to the master's report and accounting which was overruled by the chancellor and renews these objections on this appeal. We affirm.

This estate has been in litigation for nearly eight years. During that time Mrs. Leah Lundy Lott, the widow of Archie Lott and complainant below, has died. The case has been revived as "the Executrix of the Estate of Leah Lundy Lott, deceased". The attorney of record for Leah Lundy Lott, administratrix CTA, was served with process for this appeal. From the record we are able to establish that the same attorney represents the executrix of the estate of Leah Lundy Lott and a brief has been filed on her behalf although the executrix/appellee remains unidentified. We believe, with some temerity, that the appellee

Opinion

had adequate notice of this appeal and that we have jurisdiction of it.

We utilize an unpublished opinion in decision of the suit because the Uniform Partnership Act, Mississippi Code Annotated section 79-12-1, et seq. (Supp. 1977) will probably preclude similiar issues in the future.

The appellant enumerates sixteen assignments of error covering several pages of appeal. Overall, there are two issues necessary to be determined. The first is: (1) May a chancellor by his authority in probate direct the continuance of a partnership business beyond the death of one of the partners, and (2) is the finding of the master, approved by the chancellor, against the weight of the evidence?

Prior to his death on December 3, 1969, Archie A. Lott engaged in a partnership business with L. S. Broadus. It was known as the Broadus-Lott Furniture Company and its business was largely the credit sale of furniture. Although the record does not permit specific recitation of duties or responsibilities of the two partners, it does appear that Broadus initially furnished the building and the capital for the furniture operation and Lott was primarily a salesman and collector. As furniture was sold, installment or credit payments were projected into the future and as they were made, various amounts of the collections were reinvested in the business and on occasion each of the partners drew from the partnership account. The nature of the business, the condition of the record and misunderstanding between the widow and the surviving partner made accounting difficult. The master, however, conducted a full and complete hearing, with the

aid of certified public accountants and was able to state an account. It discloses, without pages of accounting detail here, that Broadus owes the estate of Archie A. Lott the principal sum of $27,769.45.

Upon the death of Archie Lott, Leah Lundy Lott, his administratrix, obtained an order authorizing the continuance of the business. Thereafter she did actively participate in the continuation of the partnership business. Whether she did so as an employee or partner is debatable. The income tax reports of Broadus during this interval on occasion reflect that she was a partner and on others that he conducted the business as the sole proprietor. In either event, there was a failure on the part of the surviving partner to account for the assets of the partnership business belonging to the estate of his deceased partner. Preferably, the acounting should have been within a reasonable time of the partner's death, but unfortunately this ideal circumstance is not before us. Instead, we are confronted with a court order designating the deceased's widow as a partner for continuation of the business, which is without great support in law; and this factor is coupled with the refusal of the surviving partner to honor his implied and statutory duty to account.

The appellant contends the chancellor in his probate role did not have authority to direct the continuance of the partnership by substituting Leah Lundy Lott for Archie Lott as a partner of Broadus. Moreover, it is contended that Lott's sole contribution to the partnership was in his role as salesman. Since his contribution to the partnership ended on death, it is argued that continued participation of his estate in the benefits of the partnership would be inequitable.

From an academic viewpoint, and without more, appellant is technically correct since the order authorizing the continuance of deceased's business is directed to the administrator of an estate and not to other parties, such as a surviving partner as is the case here. There is, however, more involved in this suit. The chancellor, on the facts presented, does have the general authority to continue the business of an estate when such continuation is directed to its orderly termination.

Mississippi Code Annotated section 91-7-173 (1972) (then Miss. Code Ann. sec 579 (1942) in general terms empowers a chancellor to continue a deceased's business upon proper application, but Mississippi Code Annotated section 91-7-119, et seq. (1972)[1] (then Miss. Code Ann. sec. 553 (1942)) provides more specifically the proper procedure for the sale of a partnership upon the death of a partner and for final accounting, leaving the legal hypothesis that it would prevail over the former general statute.

The master properly interpreted, and the trial court approved, the application of Section 91-7-173 as limited in its effect to the administratrix of the estate of Archie Lott. The continuation of the partnership for accounting purposes was based upon his finding of a de facto partnership created by the actual continuation of business by the widow and surviving partner as well as the surviving partner's failure to satisfy his statutory duty to account. In this context the master considered the probate statute as

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[1] Miss. Code Ann. sec. 91-7-119 through sec. 91-7-133 (1972) have been repealed by General Laws of 1976, ch. 407, sec. 44, effective from and after April 1, 1977.

merely one factual indication, together with the continuation of the business and the duty to account, in concluding the partnership continued beyond the death of Archie A. Lott. We are unable to state that the master erred absolutely in this conclusion or that the chancellor erred in approving the account based upon the conclusion.

There is no dispute that Archie A. Lott and Broadus were business partners. The law is settled that when a partnership is dissolved by death, the survivor owes the duty of accounting to his estate and under limited circumstances the partnership may continue until the account is made. Mississippi Code Annotated section 91-7-119 through 91-7-133 (1972) contemplates such accounting, and see **Mayson's Administrator vs. Beazley's Administrator,** 27 Miss. 106 (1854), wherein it is stated that a court of equity will, for certain purposes, let the partnership continue until an accounting is made by the surviving partner. And, "till the account was given . . . a court of equity . . . will require the survivor to account for whatever profits he may have made by the use of the property or the employment of the joint capital." (27 Miss. at 112). We have found no later cases from this state, nor are we cited any, to alter this common law principle, nor does Section 91-7-119 (providing for sale of partnership interest) alter the principle where a business is continued and there is no request for the order of sale.

We are of the opinion the existence of the original partnership, the continuing nature of the partnership business, the joint engagement of Mrs. Lott with Broadus in its operation after the death of her husband, and the surviving partner's failure to conclude the business or to

account, were sufficient for the master to conclude the partnership continued until September 30, 1973.

We think the chancellor did not err in adopting the master's statement of account.

AFFIRMED.

INZER, P. J., SMITH, P. J., ROBERTSON SUGG, WALKER, BROOM, LEE AND BOWLING, JJ., CONCUR.

Opinion

STATE OF MISSISSIPPI

HINDS COUNTY

I, Mrs. Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 7th day of April A. D., 1978.

Julia H. Kendrick
Clerk Supreme Court

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

WEDNESDAY, NOVEMBER 16, 1977, COURT SITTING

L. S. BROADUS

#49,662

LEAH LUNDY LOTT, ADMINISTRATRIX OF ESTATE OF ARCHIE A. LOTT

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Chancery Court rendered in this cause on the 28th day of April, 1976 be and the same is hereby affirmed. Judgment is in favor of Leah Lundy Lott, Administratrix of the Estate of Archie A. Lott, Deceased against L. S. Broadus and Mrs. L. S. Broadus and Maxie Broadus, sureties, in the amount of $27,769.45 plus interest at the rate of 6% per annum from September 30, 1973 until paid together with all costs taxed in the Court below and this Court adds the sum of $1,388.47 being damages at the rate of 5% as provided for by statute. It is further ordered, adjudged and decreed that the appellant and Mrs. L. S. Broadus and Maxie Broadus, sureties on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

MINUTE BOOK "BS", Page 479

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI

WEDNESDAY, JANUARY 18, 1978, COURT SITTING

L. S. BROADUS

#49,662 v

ESTATE OF ARCHIE A. LOTT

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.
MINUTE BOOK "BS", Page 530

STATE OF MISSISSIPPI

HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the judgments rendered by the Court in the case of L. S. Broadus vs. Leah Lundy Lott, Administratrix of Estate of Archie A. Lott, #49,662, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 7th day of April A. D., 1978.

Julia H. Kendrick
Supreme Court Clerk

APPENDIX "C-1"

U. S. Constitution

Section X

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX "C-2"

U. S. Constitution

Amendment XIV

1. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D-1"

Bill of Rights

Section 14. No person shall be deprived of life, liberty, or property except by due process of law.
SOURCES: 1817 art I sec 10; 1832 art I sec 10; 1869 art I sec 2.

APPENDIX "D-2"

Mississippi Constitution

Section 16. Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.
SOURCES: 1817 art I sec 19; 1832 art I sec 19; 1869 art I sec 9.

APPENDIX "E-1"

Trusts and Estates

Sec 91-7-119. Sale of partnership interest.
The executor or administrator, with the approval of the chancellor, may sell the interest of any decedent in the partnership estate.
SOURCES: Codes, 1942, sec 553; Laws, 1936, ch. 237.

Sec 91-7-121. Inventory of partnership estates.
The executor or adminstrator of the estate of a deceased member of a copartnership shall cause to be made a separate inventory of the whole of the partnership estate, goods, chattels, rights, and credits, appraised at its true value, as in other cases; but the appraisers shall carry out

in the footing an amount equal only to the deceased's share of the copartnership interest.

SOURCES: Codes, 1892, sec 1909; 1906, sec 2084; Hemingway's 1917, sec 1751; 1930, sec 1657; 1942, sec 554.

APPENDIX "E-2"

Executors and Administrators

Sec 91-7-123. Property delivered to the surviving partner.

The property thus appraised shall remain in the hands of the executor or administrator or be delivered over to the surviving partner, who will undertake the management thereof agreeably to the conditions of a bond which he shall give, payable to the state, in such sum and with such sureties as is required in other cases of administration.

SOURCES: Codes, 1892, sec 1910; 1906, sec 2085; Hemingway's 1917, sec 1752; 1930, sec 1658; 1942, sec 555.

Judicial Decisions

A surviving partner, without giving bond, may proceed to the collection of the debts and to winding up the affairs of the partnership until an executor or administrator has been appointed, appraises the partnership estate and cites him to appear and qualify or renounce his right. McCaughan v Brown, 76 M 496, 25 So 155.

The fact that a surviving partner is indebted to the estate of his deceased partner does not preclude him from administering the partnership estate as authorized by this section (Code 1942, sec 555). Lance v Calhoun, 85 M 375, 37 So 1014.

The bond should be in a penalty equal to the value of the partnership estate and not merely that of the interest of the deceased partner. Gurley v Gurley, 77 M 413, 26 So 962.

Surviving partner not entitled to compensation for administering partnership estate unless authorized by statute, partnership agreement or some other valid understanding. Byrd v King, 120 M 435, 82 So 312.

Joinder of surviving partner in fraudulent conveyance by executors of decedent for purpose of acquiring lands sold for themselves, did not pass title. Meyer v Meyer, 106 M 638, 64 So 420.

Executors acquiring lands of estate through dummy purchaser held same in trust for persons interested in the estate. Meyer v Meyer, 106 M 638, 64 So 420.

Sec 91-7-125. Condition of the partner's bond.

The condition of such bond shall be, in substance, as follows:

"The condition of the above bond is, that if _____, surviving partner of the late firm of _____, shall use due diligence and fidelity in closing the affairs of the late copartnership, apply the property thereof toward the payment of the partnership debts, render an account upon oath to the chancery court of _____ county whenever by it thereunto required, of all the partnership affairs, including the property owned by the late firm, and the debts due thereto, as well as what may have been paid by the survivor toward the partnership debts, and what may still be due and owing therefor, and deliver and pay over within two years, unless a longer time be allowed by said court, to the executor or administrator of said deceased partner the decedent's share of the excess, if any there be beyond satisfying the partnership debts, then the above bond shall be void."

SOURCES: Codes, 1892, sec 1911; 1906, sec 2086; Hemingway's 1917, sec 1753; 1930, sec 1659; 1942, sec 556.

APPENDIX "E-3"

Sec 91-7-127. Status of surviving partner.
The court shall have the same authority to cite such surviving partner to account and to adjudicate upon his accounts as in the case of an administrator; and the parties interested shall have the like remedies on such bond for any misconduct or neglect of the survivor as may be had against administrators.

Sec 91-7-129. Survivor refusing to act.
In case the surviving partner, and all of them if more than one, having been duly cited for that purpose, shall neglect or refuse to give the bond required in such case, the executor or administrator of the estate of the deceased partner, upon giving bond as provided in section 91-7-131, shall forthwith take the whole partnership estate, goods, chattels, rights, and credits, into his own possession and shall be authorized to use the name of the survivor in collecting the debts due the late firm; and shall, with the partnership property, pay the debts due from the late firm with as much expedition as possible, and return or pay to the surviving partner his share of the excess, if any there be.
SOURCES: Codes, 1892, sec 1913; 1906, sec 2088; Hemingway's 1917, sec 1755; 1930, sec 1661; 1942, sec 558.

Sec 91-7-131. Executor's further bond in such case.
Before proceeding to administer upon the partnership property, the executor or administrator shall be required by the court or clerk to give further satisfactory bond, conditioned that he will faithfully execute the trust with no unnecessary waste or expense, which bond may be enforced like other administration bonds.

APPENDIX "E-4"

Executors and Administrators

Sec 91-7-133. Duties of surviving partners.
Every surviving partner, on the demand of the executor or administrator of the deceased partner, shall exhibit to the appraisers for appraisement the partnership property belonging to the firm at the time of the death of the deceased partner. In case the administration thereof shall devolve upon the executor or administrator, the survivor shall surrender to him, on demand, all the property of such partnership, including its books and papers and all necessary documents pertaining to the same, and shall afford him all reasonable information and facilities for the execution of his trust. For failure to do so, the surviving partner may be committed by the court, after due citation, to the jail of the county as for a contempt.
SOURCES: Codes, 1891, sec 1915; 1906, sec 2090; Hemingway's 1917, sec 1757; 1930, sec 1663; 1942, sec 560.